THE PUBLIC LAWYER

SEPTEMBER 2003

NEVADA SUPREME COURT CASES

Construction Indus. Workers' Compensation Group v. Chalue, 119 Nev. Adv. Op. 37 (August 21, 2003). "This is an appeal from a district court order upholding the decision of an appeals officer that respondent John Chalue provided sufficient evidence to rebut the presumption that marijuana was a proximate cause of his work-related injuries pursuant to NRS 616C.230. We agree with the district court that a preponderance of the evidence is the proper evidentiary standard required to rebut the presumption. Substantial evidence existed to support the decision of the appeals officer; therefore, Chalue is entitled to the appropriate workers' compensation benefits provided by Construction Industry Workers' Compensation Group (Construction Industry), on behalf of its member, Mojave Electric."

Huntington v. MILA, Inc., 119 Nev. Adv. Op. 38 (August 27, 2003). "In this appeal, we consider whether a title insurance company, conducting a title search on behalf of a lender for the purpose of issuing a title policy, is the lender's agent. We conclude that a title company is not the lender's agent and, thus, the title company's constructive notice may not be imputed to the lender."

City of Las Vegas v. Bustos, 119 Nev. Adv. Op. 39 (August 27, 2003). "The landowner is entitled to just compensation for the government's taking of private property and has the burden of establishing the value of land so taken. Just compensation is determined by the property's market value 'by reference to the highest and best use for which the land is available and for which it is plainly adaptable.' However, such use must be reasonably probable. In general, the trier of fact may consider zoning restrictions permitting a viable economic use of the property in determining the property's value. In fact, the district court should give 'due consideration . . . to those zoning ordinances that would be taken into account by a prudent and willing buyer.' We conclude that the district court properly considered the current zoning of the property, as well as the likelihood of a zoning change. The trier of fact may consider the effect of future rezoning or variances on the highest and best use of the condemned property when determining its value."

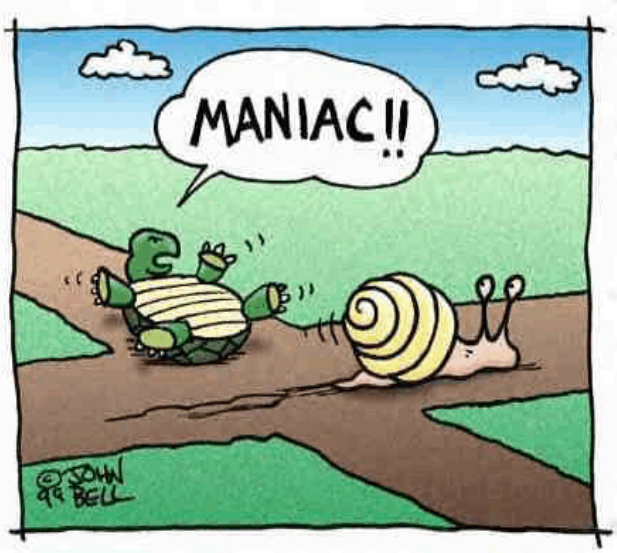
Crestline Investment Group, Inc. v. Lewis, 119 Nev. Adv. Op. 40 (August 28, 2003). "We conclude that (1) Lewis' services as an employee did not enhance the value of Crestline's property, thus he could not record an enforceable mechanic's lien under NRS 108.223; (2) Lewis waived any lien claim by failing to timely file a statement of facts under NRS 108.239(2)(b); and (3) the district court abused its discretion by increasing the lien during a proceeding to expunge Lewis' lien claim as frivolous. We therefore reverse the district court's order and remand with instructions to expunge Lewis' lien."

Keife v.Logan, 119 Nev. Adv. Op. 41 (August 28, 2003). "This case involves the issue of whether, after a railroad company

abandons a right-of-way, the adjacent landowner or the underlying landowner is entitled to the reversionary interest in the right-of-way. We hold that the reversionary interest in the right-of-way vests in the landowner who establishes title to the land underlying the right-of-way."

Evans v. Samuels, 119 Nev. Adv. Op 42 (August 28, 2003). "In this appeal, we consider whether a lien expires if the judgment is not renewed within six years. We conclude that NRS 17.150(2) plainly requires that a judgment be renewed within six years from the date it was docketed in order to continue a lien."

Schneider v. County of Elko, 119 Nev. Adv. Op. (August 28, 2003). "Terry and Jana Schneider (the Schneiders) appeal a district court order dismissing their complaint wherein they alleged that they were entitled to damages resulting from the Elko County Recorder's recordation of a record of survey. We conclude that the district court did not err when it determined that the county recorder properly recorded the record of survey because the survey satisfied the statutory requirements for a record of survey. Therefore, we affirm the district court's order dismissing the Schneiders' complaint for failure to state a claim."



Protecting Children from Sexual Predators

Grant Sparks
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http://www.govwest.com

Since its inception, the Texas Internet Bureau has been dedicated to fighting child pornography, identity theft, software piracy, and other Internet-related crimes. However, Texas Attorney General Greg Abbott recently launched a new program to aggressively pursue online sexual predators. Such predators solicit children over the Internet via chat rooms, and then make arrangements to meet and, in many cases, to have sexual relations with the child.
Few crimes are more heinous. Fortunately, few anti-crime initiatives have met with quicker success than Texas' anti-predator initiative.

A Major Coup

The Texas Internet Bureau scored a major coup in its war against sexual predators almost immediately after the new program's launch. On May 10, 2003, James Steven Thornton, Jr., 26, a parolee living in Lampasas, Texas, was arrested as he arrived in the town of Bee Caves in Travis County, Texas, to meet what he assumed was a 13-year-old female he had met in a chat room. The female "child" turned out to be a Texas Internet Bureau investigator.

Thornton had allegedly engaged the online "female" in a four-hour, sexually explicit conversation, with full knowledge that she claimed to be 13. He instructed her where to meet him, told about the pickup he would be driving, and described the style of clothes he would be wearing. His subsequent capture at

the scene of the intended rendezvous was only the beginning. Texas Internet Bureau officers also executed a search warrant for Thornton's home, where they seized computer hardware and software, business records, personal correspondence, and the faxes and maps he allegedly used in the planning the meeting.

Thornton has been charged with criminal solicitation of a minor, a second-degree felony, and is awaiting trial. Because he has three prior felony offenses, if convicted, he will receive between 25 to 99 years in prison.

Fighting Child Pornography

In addition to initiating their own investigations, the Texas Internet Bureau also helps local law enforcement officers throughout Texas to fight child predators in their own communities. The help is greatly appreciated by fellow anti-crime agencies: although Internet-related crimes are growing at a rapid pace, many local law enforcement agencies in Texas lack cybercrime investigators.

Consider just one example of the success this cooperative effort has produced. The Texas Internet Bureau and Johnson County District Attorney Dale Hanna recently obtained a guilty plea from a former Tarrant County Community College police officer, Ernest Dwaine Brown, 46, of Cleburne, Texas. Brown was charged with ten counts of possession and three counts of promotion of child pornography. He entered his guilty plea in Johnson County District Court and agreed to a jail term of 14 years.

Officers had arrested Brown at his home after the Internet Bureau had acted on a tip from the National Center for Missing and Exploited Children and obtained a search warrant. At the time of the arrest, Brown was charged with only one count of possession of child pornography, based on a printed pornographic image found in the home during the officers' search. Further forensic analysis of Brown's computer equipment, however, revealed a number of electronic images in his possession showing minor children engaged in sexual conduct with adults. The more serious count of promotion against Brown stemmed from the fact that he had transferred images of child sexual conduct to CD-ROM discs, which could be displayed as a movie on a computer screen and potentially shared with others. District Attorney Hanna praised the work of the Internet Bureau and insisted that sex crimes in Johnson County would not be tolerated. He noted the prosecution was able to achieve a 14-year sentence against an individual with no criminal record, demonstrating the seriousness with which such offenses were regarded.

Don't Mess With Texas' Children

Texas Attorney General Greg Abbott could not agree more. Since taking office in December 2002, Attorney General Abbott has emphasized the need to protect those most vulnerable in society, particularly children.

Attorney General Abbott believes that it is imperative to stop child predators well before they attempt to commit even more heinous crimes against their young victims. This belief is based in part on Internet Bureau findings that the majority of online predators are not one-time offenders, but that they typically solicit sexual acts from dozens of minors. Texas Internet Bureau officers and law enforcement officials across Texas are committed to ensuring that all potential sexual predators in Texas hear Abbott's message loud and clear: "We'll be watching you. Don't mess with Texas'

children. Period."

Grant Sparks is an Assistant Attorney General for the State of Texas. For further information on the cybercrime program, contact R.L. Smith, chief investigator for the Texas Internet Bureau, at (512) 463-0073 or via email at robert.smith@oag.state.tx.us. The Internet Bureau's web site is: http://www.texasinternetbureau.com/internet

Using Computers to Fight

In June 2000, in order to address the soaring backlog of computer-evidence processing, the Dallas Division of the Federal Bureau of Investigation and the U.S. Attorney for the Northern District of Texas began exploring ways to employ federal, state, and local examiners to provide much-needed computer forensics support to cash-strapped law enforcement agencies in the North Texas region.

The premise was simple: to use existing resources to assist the 137 counties of North Texas, at no cost to the counties, in examining computer and digital evidence essential to case development and prosecution. The need was great, since many of these local agencies had few resources of their own to meet the growing demand for digital evidence analysis—and nowhere else to turn. By the end of 2000, the idea had become reality—and the North Texas Regional Computer Forensics Laboratory (NTRCFL) was born. Eleven new computer forensics examiners were selected from eight local agencies and one federal agency, with each new recruit trained by the existing examiners. Within a short period of time, the new computer forensics team had pored through more than 2.6 terabytes of digital evidence for a variety of federal and local agencies small enough to have no full-time detective. The NTRCFL's work has multiplied in the years since. In 2001, the laboratory processed more than 6.3 terabytes of data and, in 2002, more than 14.6 terabytes supporting investigations and prosecutions in 474 cases. The benefits to crime-fighting can be enormous. As Michael S. Morris, the NTRCFL's Director, emphasizes, "The computer is not just a tool for criminals. Computers store evidence that trained law enforcement specialists may seize in order to provide a court with evidence of a crime." —Adapted from NTRCFL.org

NINTH CIRCUIT CASES

(Cases without hyerlinks can be found at http://www.ca9.uscourts.gov/ca9/newopinions.nsf)

Jacobus v. Alaska, No. 01-35666 (9th Cir. August 12, 2003). "In 1996, the Alaska legislature enacted sweeping reforms to its campaign finance system. Corruption and the appearance of corruption had led to low voter turnout and widespread disillusionment with the electoral system. Determined to close loopholes left open by previous attempts to establish meaningful reform, the new act restricted not only contributions to candidates, but also contributions to political parties, including 'soft money.' Unsurprisingly, these new restrictions have been hotly contested in both state and federal courts."

"Although the term 'soft money' is often used interchangeably with the phrase 'not for the purpose of influencing the election or nomination of a candidate,' as we hold today, political parties frequently spend soft money precisely to influence the election or nomination of a candidate. This practice creates a linguistic conundrum in which contributions that are not for the purpose of influencing elections are in fact used to

influence elections. In discussing soft money throughout this opinion, we treat it as all money contributed to a political party not expressly earmarked to influence the nomination or election of a candidate."

"Because the limitations on soft money contributions imposed here reflect Alaska's concern about these same dangers, we uphold the limits on soft money contributions. We affirm, however, the district court's ruling striking down as unconstitutional Alaska's limit on the value of volunteer professional services that an individual may donate to a political party."

United States v. Alvarez-Farfan, No. 02-10324 (9th Cir. August 7, 2003). "The district court abused its discretion in preventing the jury from comparing the documents. The law does not require 'a questioned document examiner to vouch for the similarity of handwriting, but instead, allows the jury to determine for itself whether the same person's handwriting appears on two documents. In fact, '*Woodson* makes clear that the jury is *obliged* to make such comparisons and draw conclusions from them.' Because Rivera's debriefing statement unquestionably qualifies as Rivera's 'admitted or proved handwriting,' the district court erred in preventing the jury from comparing the documents to determine whether Rivera also signed the motel receipt."

Dannenberg v. Valdez, No. 02-16273 (9th Cir. August 11, 2003). A California inmate won $9,000 and was awarded $57,000 in attorney fees. The state challenged the fees under the Prison Reform Litigation Act. "Thus, 'whenever a monetary judgment is awarded,' subsection (d)(2) caps attorneys' fees incurred for the sole purpose of securing the monetary judgment. By contrast, fees incurred to obtain injunctive relief, whether or not monetary relief was also obtained as a result of those fees, are not limited by this provision. Construing the fee limitation this way frees district courts to 'take into account all the provisions of section 1997e(d),' enabling them to award fees in an amount proportional to the overall relief obtained while honoring the cap on fees incurred to obtain money damages. Appellee in this case obtained injunctive relief in addition to money damages, and there has been no showing that any portion of the attorneys' fees was incurred for the sole purpose of obtaining monetary relief. Accordingly, we find no error in the district court's ruling that no portion of the fees was limited to 150 percent of money damages."

Haynie v. County of Los Angeles, No. 01-55731 (9th Cir. August 12, 2003). 42 U.S.C. §§ 1983 and 1985 claims for unlawful search and seizure, excessive force, and conspiracy were not actionable where a traffic stop, detention, and pat down were all reasonable under the circumstances. http://caselaw.lp.findlaw.com/data2/circs/9th/0155731p.pdf

Bailey v. Rae, No. 02-35144 (9th Cir. August 13, 2003). "This petition for writ of habeas corpus presents the question whether a state prosecutor's failure to disclose therapy reports concerning a victim's mental capacity constitutes a due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963). The state criminal convictions at issue, for sexual abuse and sexual penetration, require that the victim be incapable of consent due to a mental defect. Because the reports in question are exculpatory in nature and would have affected the trial in such a way as to undermine our confidence in the jury's verdict, we conclude that a *Brady* violation occurred. Under the circumstances, the state

court's decision was both contrary to, and an unreasonable application of, federal law. We reverse the district court's denial of the petition."

McIntyre v. Bayer, No. 01-55169 (9th Cir. August 13, 2003). "We must decide whether a state statute, requiring interest generated by inmate trust accounts to be retained by prison authorities and expended for the benefit of the prison population as a whole, effects an unconstitutional taking."

"As noted above, it is clear that by transferring the interest earned on the pooled resources of prisoner's property fund to the offenders' store fund to be expended 'for the welfare and benefit of all offenders,' Nev. Rev. Stat. § 209.221 does effect a transfer of the interest earned from the prisoners to the state. It is equally clear, though, that the costs the state incurs in administering the prisoners' property fund far outstrip the gross interest earned by the fund."

United States v. McDonald, No. 02-30245 (9th Cir. August 13, 2003). "This appeal arises out of Carl Greer MacDonald's participation in the production of methamphetamine on public lands in Montana. MacDonald pled guilty to a federal conspiracy charge and was sentenced to 30 months imprisonment. The district court enhanced his sentence under the United States Sentencing Guidelines due to the unlawful discharge of a hazardous or toxic substance in connection with the violation. MacDonald disputes the applicability of a hazardous substance determination to his circumstances and now appeals that sentence. Because the district court did not clearly err in its factual findings and did not abuse its discretion in applying the enhancement, we affirm."

Retail Flooring Dealers of America v. Beaulieu of America, LLC, No. 02-55076 (August 14, 2003). "Retail Flooring's counsel next argues that the district court erred in awarding a Rule 11 sanction because Beaulieu failed to comply with Rule 11's 'safe harbor' provision. We agree and reverse the district court's award of the Rule 11 sanction. The safe harbor provision gives an attorney the opportunity to withdraw or correct a challenged filing by requiring a party filing a Rule 11 motion to serve the motion 21 days before filing the motion. See Fed. R. Civ. P. 11(c)(1)(A). We have stated that '[t]he purpose of the safe harbor . . . is to give the offending party the opportunity, within 21 days after service of the motion for sanctions, to withdraw the offending pleading *and thereby escape sanctions*. A motion served after the complaint had been dismissed [does] not give [the offending party] that opportunity.'"

Johnson v. County of Los Angeles, No. 02-55881 (9th Cir. August 15, 2003). "Notably, on the 'intrusion on his Fourth Amendment Rights' side of the scale, Johnson does not allege anything more violent than hard pulling and twisting. We conclude that hard pulling and twisting applied to extract a moving armed robbery suspect from a getaway car under these circumstances is a minimal intrusion on his Fourth Amendment interests. On the other side of the scale, the 'countervailing governmental interests' are measured by such factors as 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' We discern substantial 'governmental interests' in this case. Armed bank robbery is without question a very serious crime, and armed robbery suspects pose an obvious and significant danger to the police and others. Moreover, Johnson and his confederate Edwards further

demonstrated their willingness to impose a life threatening danger upon the police and the public by their lengthy high-speed flight from the deputies.We conclude that the balance tips decisively in favor of the governmental interests in this case."

Holly D. v. California Inst. of Technology, No. 01-56050 (9th Cir. August 15, 2003).
"We join the Second Circuit in holding that a plaintiff who contends that she was coerced into performing unwanted sexual acts with her supervisor, by threats that she would be discharged if she failed to comply with his demands, has alleged a tangible employment action under Title VII that, if proved, entitles her to relief against her employer. Here, Holly D. has properly pleaded a claim for relief on a tangible employment action theory; however, she has not presented sufficient evidence on that claim to survive summary judgment. Although we assume that Holly D.'s allegations in this case would also support a claim under the hostile environment prong of Title VII, and that she presents sufficient evidence to establish a prima facie case of such harassment, we hold that Caltech has established, as a matter of law, the affirmative 'reasonable care' defense that employers may assert with respect to such charges. We also reiterate that Title VII does not afford monetary relief against a supervisor, such as Professor Wiggins, even when the supervisor is the person who engaged in the underlying wrongful conduct. We therefore affirm the district court's grant of summary judgment in favor of the defendants on Holly D.'s Title VII claims."

Clear Channel Outdoor Inc. v. City of Los Angeles, No. 02-56947 (9th Cir. August 15, 2003). "The City of Los Angeles, its Department of Building and Safety, and the Chief of the Department's Code Enforcement Bureau appeal the district court's order granting the motion of Clear Channel Outdoor, Inc., Viacom Outdoor, Inc., and National Advertising Company for a preliminary injunction enjoining the City from implementing ordinances that provide for the inspection of off-site billboards and the assessment of a fee to cover the cost of that inspection. Because we find it unlikely that the advertising companies will prevail on their First Amendment claims, we vacate the preliminary injunction."

"The district court's analysis of the inspection ordinances' effect on noncommercial speech is incomplete in at least three respects. *First*, the district court's analysis overlooks considerable precedent upholding the viability of the on-site/off-site distinction. *Second*, that analysis appears to be based on a misunderstanding of how the on-site/off-site distinction arises. *Third*, to the degree the on-site/off-site distinction might implicate noncommercial speech, the recent amendment to the ordinance removes a potential problem.

National Ass'n of Homebuilders v. Norton, No. 02-15212 (9th Cir. August 19, 2003).
"The National Association of Home Builders, the Southern Arizona Home Builders Association, and the Home Builders Association of Central Arizona appeal the district court's decision upholding the designation of a population of cactus ferruginous pygmy-owls in Arizona as a distinct population segment pursuant to the Fish and Wildlife Service's *Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act*, 61 Fed. Reg. 4722 (Feb. 7, 1996) . Home Builders argue that this DPS designation violated the *DPS Policy* because the Arizona pygmy-owl population is neither discrete nor significant. We hold that, although the FWS did not arbitrarily find the Arizona pymgy-owl

population to be discrete, the FWS arbitrarily found the discrete population to be significant. We therefore reverse the district court's decision and remand the Listing Rule to the district court.

United States v. Alpine Land & Reservoir Co., No. 01-15565 (9th Cir. August 20, 2003). District court erred in granting a blanket equitable exemption to intrafarm transfers of water rights, from operation of Nevada's forfeiture laws, but issue is remanded for findings on equitable considerations in individual cases; applications granting transfers must be remanded. http://caselaw.lp.findlaw.com/data2/circs/9th/0115665p.pdf

Karam v. City of Burbank, No. 02-55954/56220 (9th Cir. August 20, 2003). Appellant's 42 U.S.C. section 1983 claims, arising from charges in connection with refusal to leave a city council meeting, fail for lack of "seizure" under the Fourth Amendment and for lack of causation under the First Amendment. http://caselaw.lp.findlaw.com/data2/circs/9th/0255954p.pdf

Green v. City of Tuscon, No. 02-16700 (9th Cir. August 20, 2003). Arizona's law requiring consent to city incorporation by existing cities within six miles of the proposed city was upheld: "We hold that § 9-101.01 does not violate equal protection and affirm the district court's grant of summary judgment in favor of Defendants. Although Arizona has created a constitutionally protected right to vote on municipal incorporation, § 9-101.01 does not unconstitutionally burden that right. In the absence of a suspect classification, the Supreme Court has applied strict scrutiny only to voting regulations that prohibit some residents in a given electoral unit from voting, or that dilute the voting power of some residents in a given electoral unit. Section 9-101.01 is not analogous to either of these two types of voting regulations because it treats all residents of the relevant electoral unit, Tortolita, equally. Section 9-101.01 admittedly draws geographical distinctions between those unincorporated communities that are near existing municipalities and those that are not, but we decline to extend strict scrutiny to this type of voting regulation. We conclude that § 9-101.01 is rationally related to Arizona's legitimate interest in regulating the establishment of new municipalities and in protecting the interests of existing ones."

Evanchyk v. Stewart, Nos. 02-16744 (9th Cir. August 21, 2003). "Under Arizona law, a conviction for first-degree murder can be based on either or both of two theories: premeditated murder (an intentional, planned killing) or felony murder (a killing that results from the intentional commission by defendant of another felony, but which does not necessarily involve an intent to kill). Michael Evanchyk was tried in Arizona state court, together with other defendants, for multiple crimes in connection with events that resulted in a death. He was acquitted by a jury of first-degree murder and of burglary, but was convicted of second-degree murder and of conspiracy to commit first-degree murder. He petitioned the district court for habeas corpus relief under 28 U.S.C. § 2254, challenging only the conviction for conspiracy to commit first-degree murder. The district court granted his petition conditionally, subject to the State of Arizona's ability to retry him on that charge. The district court held that under the instructions given to the jury, Evanchyk could have been convicted for, in effect, conspiracy to commit felony murder, which is not a crime under Arizona law. The State appeals, contending that there was no instructional error and that any error was

harmless, in any event. Evanchyk cross-appeals, arguing that the district court's conditional grant, permitting a re-trial, was erroneous on double jeopardy or collateral estoppel grounds, and also that the district court erroneously denied his ineffective assistance of counsel claim. We affirm."

Miller v. Clark County, No. 02-35558 (9th Cir. August 21, 2003). "We consider whether a sheriff's deputy violated a criminal suspect's Fourth Amendment right to be free from unreasonable seizures by ordering a trained police dog to 'bite and hold' the suspect until officers arrived on the scene less than a minute later. Because we conclude that the officer's use of the dog here did not violate the suspect's Fourth Amendments rights, we affirm the district court's judgment."

United States v. Chase, No. 01-30200 (9th Cir. August 22, 2003). "A jury convicted Defendant Steven Gene Chase of violating 18 U.S.C. § 115(a)(1)(B) after he made a threat against agents of the Federal Bureau of Investigation. The jury acquitted him of a charge involving threats to other FBI agents. The threat underlying Defendant's conviction was expressed to a telephone operator at a Kaiser Permanente clinic. The threats as to which Defendant was acquitted were communicated, during therapeutic sessions, to his psychiatrist, who testified about them."

"On appeal, Defendant argues that the psychotherapist patient privilege precluded the psychiatrist's testimony about what he told her during therapeutic sessions. We agree and hold that the privilege applied; we decline to craft a 'dangerous patient' exception to the testimonial privilege. Thus, the district court erred in admitting the psychiatrist's testimony regarding threats that Defendant had related during treatment. Nonetheless, we affirm Defendant's conviction, because the error was harmless."

BOSTON GLOBE

LAWYERS QUESTIONING, ABANDONING THEIR PROFESSION

Jean Terranova wasn't the only lawyer in Massachusetts this year feeling deep dissatisfaction with her choice of profession. In fact, she wasn't even the only soon-to-be-ex-lawyer in her class at chef school.

A death penalty appeals specialist from Framingham, Terranova, 38, said she was fed up with increasingly strict laws to limit appeals, inflexible sentencing guidelines, and funding shortages that prevented her from hiring the necessary experts.

"The courts had become so robotic," said Terranova, who plans to become a private chef once she wraps up her case involving a death-row inmate in Texas. "Nobody cared about justice anymore; it was just about applying rules. I got very frustrated with that. I always liked to cook." One of two lawyers in her cooking class, Terranova is among a steadily rising number of attorneys questioning whether to stay in a field that no longer offers what they once considered key draws: a chance to help clients and the ability to choose interesting cases over lucrative ones.

After 11 years as a lawyer, Terranova graduated this summer from the Cambridge School of Culinary Arts, an intensive, 10-month program that trains professional chefs. Instead of scouring case law or honing pleadings, she faced other challenges such as making a palate-pleasing shumai dumpling without using ginger.

While most attorneys are not abandoning briefs for brioche, virtually everyone from bar association presidents to law school deans agrees that these are times of deep dissatisfaction and angst in the legal industry. http://www.boston.com/news/local/articles/2003/08/18/pleas_of_frustration?mode=PF

"Is getting killer evidence and getting us a huge attorney fee a generally accepted societal good?"

SECRET TAPING: Two New Opinions Permit Broader Lawyer Secret Taping
http://www.ethicsandlawyering.com

Many of you will remember that, two summers ago, the ABA reversed its 1974 position that lawyers may not secretly tape. What the ABA thought was deceit and misrepresentation after the Nixon administration became truth-seeking behavior after the Clinton administration. Or something like that. Well, two more opinions have generally followed the ABA's new, more permissive approach. Alaska has recently taken the position, as did the ABA in Formal Opinion 01-422 (June 24, 2001), that surreptitious recording of a conversation does not, in and of itself, constitute deceit or misrepresentation in violation of Rule 8.4(c). Alaska Bar Ass'n, Ethics Op. No. 2003-1. The Association of the Bar of the City of New York has taken a tentative step down the same analytical path. Maybe. Ass'n of the Bar of the City of New York, Formal Op. 2003-2. Calling the ABA change of heart "an overcorrection," the Association asserts that secret taping "smacks of trickery and is improper as a routine practice." When do they say that a New York lawyer may secretly tape? When "the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good." Well, I'm sure New York lawyers can easily figure out when that would be.

Alaska Bar Ass'n, Ethics Op. No. 2003-1

Ass'n of the Bar of the City of New York, Formal Op. 2003-2

OTHER CASES

Johnson v. Daley, Nos. 00-3981(7th Cir. August 19, 2003). "Section 803(d) of the Prison Litigation Reform Act, codified at 42 U.S.C. §1997e(d), sets both absolute and relative limits on attorneys' fee shifting. The district court held these limits unconstitutional because they disadvantage prisoners compared with other plaintiffs, whose recoveries under 42 2 Nos. 00-3981 & 00-4115 U.S.C. §1988(b) in constitutional-tort litigation are not subject to any statutory maximum. Every court of appeals that has considered this question has held, to the contrary, that §1997e(d) is within Congress' authority. Like these other circuits, we hold that §1997e(d) is rationally related to valid objectives and hence is within the legislative power, whether or not it is wise."
http://caselaw.lp.findlaw.com/data2/circs/7th/003981p.pdf

Civil liberties for Urban Believers v. City of Chicago, No. 01-3040 (7th Cir. August 20, 2003). Summary judgment for the city is affirmed in a church association's challenge to the Chicago Zoning ordinance, under the Religious Land Use and Institutionalized Persons Act and the U.S. Constitution.
http://caselaw.lp.findlaw.com/data2/circs/7th/014030p.pdf

McKevitt v. Pallasch, No. 03-2753 (7th Cir. August 8, 2003). A district court order directing a group of journalists to produce tape recordings for use at a criminal trial in Ireland, pursuant to 28 U.S.C. section 1782, was clearly sound, so stay of the order was properly denied.

http://caselaw.lp.findlaw.com/data2/circs/7th/032753p.pdf

United States v. Gardner, No. 02-1418 (1st Cir. August 4, 2003). "On appeal, two principal issues are raised, together with some subsidiary questions, which we shall address in due course. First, the defendant argues that his motion to suppress evidence was incorrectly denied. This motion concerns evidence seized during a warrantless search of the apartment in which he was living. The District Court found that officers were given consent to enter the apartment, and that the evidence seized then appeared in plain view. Mr. Garner also argues that his conviction for possessing a firearm in furtherance of a drug-trafficking crime is not supported by sufficient evidence. As to both points, we disagree with the defendant and therefore affirm."
http://laws.lp.findlaw.com/1st/021418.html

Savard v. Rhode Island, No. 02-1568 (1st Cir. August 4, 2003). In ordering body cavity strip searches of adults arrested for non-violent, non-drug-related misdemeanors, prudent prison officials reasonably could have believed that Rhode Island's strip search policy was constitutional, thus the officials are entitled to qualified immunity.
http://laws.findlaw.com/1st/021568v2.html

Perez v. Pierluisi, No. 00-1857 (1st Cir. August 7, 2003). "Amilcar Guilloty Perez, an agent in the Special Investigation Bureau of the Puerto Rico Department of Justice, brought suit against four higher-ranking officials in the Department of Justice alleging that they retaliated against him for exercising his First Amendment rights. After an eight-day jury trial the district court granted the defendants' motions for judgment as a matter of law under Fed. R. Civ. P. 50. Guilloty now appeals, arguing that he presented sufficient evidence for the case to go to the jury. We agree with the district court that no reasonable jury could have rejected the defense of the government officials that they would have given Guilloty negative evaluations and extended his probationary period even in the absence of his protected conduct."

Sevencan v. Herbert, No. 01-2491 (2nd Cir. August 7, 2003). "The District Court granted a Certificate of Appealability on the issue of whether the trial court's refusal to except Sevencan's wife from a limited courtroom closure order violated Sevencan's Sixth Amendment rights. We hold that (1) the District Court properly conducted a *Nieblas* hearing in order to determine that the exclusion of Sevencan's wife was justified and (2) the state trial court's decision to exclude Sevencan's wife was not 'an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States,' 28 U.S.C. § 2254(d)."
http://laws.lp.findlaw.com/1st/001857.html

Transportation Alternatives, Inc. V. City of New York, No. 02-9012 (2nd Cir. August 8, 2003). "This suit, brought against The City of New York and its Commissioner of Parks and Recreation by an organization which conducts events in the City's parks presents a constitutional challenge to the fees charged by the City for such events. The United States District Court for the Southern District of New York (Scheindlin, *J.*) issued a declaratory judgment that the city's fee-setting scheme for 'special events' held on park property violates the First Amendment's guarantee of free speech, enjoined its enforcement against the plaintiff, and awarded compensatory damages to reimburse the plaintiff for fees it had paid under the challenged schemes. We affirm the district court's judgment."
http://caselaw.lp.findlaw.com/data2/circs/2nd/029012p.pdf

Solis v. Cockrell, No. 01-40354 (5th Cir. August 6, 2003). "In this federal habeas petition, Juan Montelongo Solis challenges his 1994 Texas state conviction for burglary of a habitation on the ground that a juror's belief that Solis and his brothers had a reputation for breaking into houses biased the juror against him as a matter of law. We cannot agree, and affirm the district court's denial of habeas relief."
http://caselaw.lp.findlaw.com/data2/circs/5th/0140354cv0p.pdf

United States v. Bourne, No. 01-2416 (6th Cir. July 11, 2003). "The defendant, Robert Bournes, pleaded guilty to possession of unregistered firearms in violation of 26 U.S.C. § 5861(d), reserving the right to appeal the district court's denial of his motion to dismiss the indictment based on his contention that the statute violates his right to bear arms under the Second Amendment and that the conviction violated his right to due process because he could not comply with its terms. We find no valid grounds for reversal and specifically reject the so-called 'doctrine of impossibility' on which the defendant relies."

"We hold that compliance with the relevant provisions of both the National Firearms Act and the Firearms Owners' Protection Act is easily achieved: Bournes could have complied simply by electing not to possess the machine guns at issue in this case."
http://laws.lp.findlaw.com/6th/03a0274p.html

Gunderson v. Hvass, No. 02-3617 (8th Cir. August 6, 2003). Plaintiff's conviction for a non-predatory sexual assault met the criteria for sex offender registration contained in Minnesota Stat. section 243.16, and the statute's requirement that he register did not violate his constitutional rights.
http://caselaw.lp.findlaw.com/data2/circs/8th/023617p.pdf

Hoffman-Pugh v. Kennan, No. 01-1385 (10th Cir. August 6, 2003). "This case concerns the constitutionality of a Colorado statute governing the secrecy of grand jury investigations. Plaintiff Linda Hoffmann-Pugh worked as a housekeeper for John and Patsy Ramsey prior to the highly publicized murder of their daughter, Jon Benet Ramsey. Due to her association with the Ramsey household, Ms. Hoffmann-Pugh was involved in the grand jury investigation of the murder. She now wishes to write a book about her experiences. Colorado requires a grand jury witness to take an oath not to disclose her testimony, except to discuss it with her attorney or with the prosecutor, until and unless an indictment or report is issued. The oath thereby precludes the witness from divulging her testimony even after the term of the grand jury has ended if the investigation of the crime continues. Fearing prosecution under Colorado law for contempt if she discloses her grand jury testimony, Ms. Hoffmann-Pugh sought and was granted a judgment declaring she could not be prosecuted for revealing that information. The district court held that the Colorado secrecy rules violate the First and Fourteenth Amendments. The state appeals and we reverse."
http://laws.lp.findlaw.com/10th/011385.html

Equal Opportunity Employment Comm'n v. Asplundh Tree Expert Co., Nos. 02-12386 (11th Cir. August 7, 2003). "As we said above, conciliation is at the heart of Title VII. In its haste to file the instant lawsuit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort. Under these circumstances, the sanction of dismissal, awarding attorneys' fees, is not an unreasonable remedy or an abuse of the

district court's discretion."
http://caselaw.lp.findlaw.com/data2/circs/11th/0212386p.pdf

United States v. Rapanos, No. 02-1377 (6th Cir. August 5, 2003). A conviction for unlawfully filling Michigan wetlands in violation of the Clean Water Act is affirmed, as the Act's coverage is not limited only to wetlands directly abutting navigable water.
http://laws.lp.findlaw.com/6th/03a0268p.html

Weaver v. Shadoan, No. 01-5656 (6th Cir. August 13, 2003). Police officers were entitled to immunity in a 42 U.S.C. section 1983 action, as decedent's Fourth and Eighth Amendment rights were not violated where he was arrested and died in police custody after voluntarily ingesting a lethal dose of cocaine, and then repeatedly denying his ingestion of the drugs and refusing medical treatment.
http://laws.lp.findlaw.com/6th/03a0282p.html

United States v. Blue Coat, No. 02-2350 (8th Cir. August 14, 2003). Defendant waived his appellate right to challenge a provision of his supervised release when he entered into his plea agreement.
http://caselaw.lp.findlaw.com/data2/circs/8th/022350p.pdf

Rico v. Leftridge-Byrd, No. 01-4150 (3rd Cir. August 14, 2003). The Pennsylvania Supreme Court's decision upholding defendant's conviction and sentence against a Batson challenge based on the prosecutor's use of peremptory challenges to strike Italian-American prospective jurors was not contrary to clearly established federal law as determined by the US Supreme Court.
http://caselaw.lp.findlaw.com/data2/circs/3rd/014150p.pdf

Allen v. City of Pocahantas, No. 02-1990 (8th Cir. August 15, 2003). Employee's termination did not implicate constitutionally protected liberty or property rights, and did not violate her Fourteenth Amendment rights; petition employee circulated prior to her termination did not raise a matter of public concern.
http://caselaw.lp.findlaw.com/data2/circs/8th/021990p.pdf

Schwier v. Cox, No. 02-13214 (11th Cir. August 11, 2003). Distinguishing the Ninth Circuit holding in *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999), the panel held that Georgia voters who refused to provide their social security numbers while registering to vote were entitled to a private right of action using § 1983 to enforce § 7 of the Privacy Rights Act.
http://caselaw.lp.findlaw.com/data2/circs/11th/0213214p.pdf

United States v. Knight, No. 01- 4219 (7th Cir. August 18, 2003). The government's "rolling" disclosure of impeachment and physical evidence did not prejudice defendants' right to a fair trial; *Apprendi* does not require defendant-specific findings of drug type and quantity in drug conspiracy cases.
http://caselaw.lp.findlaw.com/data2/circs/7th/014219p.pdf

Graves v. Cockrell, No. 02-41416 (5th Cir. August 15, 2003). "For the foregoing reasons, we grant Graves' Application for COA on his claim under *Brady v. Maryland*, 83 S.Ct. 1194 (1963), that the state failed to disclose to Graves that his co-defendant and key prosecution witness informed the district attorney that Graves was not involved in the charged crime on the day before he testified to the contrary at Graves' trial. We deny COA on Graves' remaining claims."
http://caselaw.lp.findlaw.com/data2/circs/5th/0241416cr0p.pdf

United States v. Almeida, No. 01-11553(11th

Cir. August 18, 2003). "We hold that when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence. The district court's error prevented the introduction of crucial evidence that would have significantly undermined the credibility of three of the Government's key witnesses. There is a reasonable possibility that the jury would not have convicted Almeida but for the district court's erroneous exclusionary ruling. The error was not harmless, and Almeida's conviction is therefore VACATED and the case is REMANDED for a new trial."
http://caselaw.lp.findlaw.com/data2/circs/11th/0111553p.pdf

United States v. Under Seal, No. 03-1269 (4th Cir. August 19, 2003). An order compelling appellant's former attorney to answer two questions before a grand jury is affirmed, as appellant waived his attorney-client privilege with respect to information sought by the government, through statements made to FBI agents.
http://laws.lp.findlaw.com/4th/031269p.html

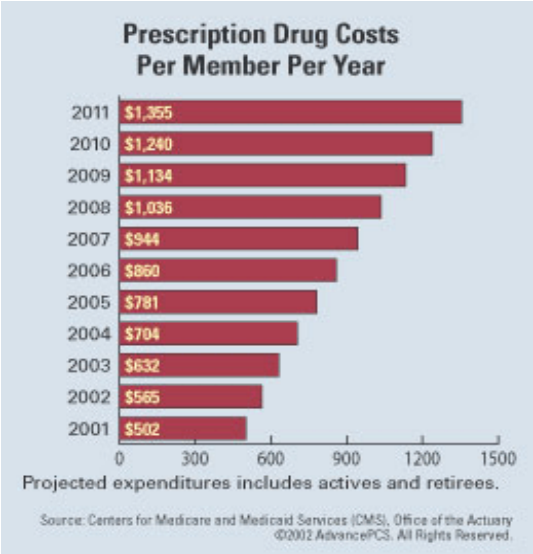
Williams v. Seniff, No. 02-1231 (7th Cir. August 20, 2003). An assistant police chief did not have a protected First Amendment right to make certain statements to the press, thus his claim of termination in retaliation for the exercise of protected speech must fail; plaintiff failed to produce evidence of a conspiracy to violate his federally-protected rights.
http://caselaw.lp.findlaw.com/data2/circs/7th/021231p.pdf

United States v. Raney, No. 02-2086 (7th Cir. August 20, 2003). Seizure of homemade adult pornography from defendant's residence did not exceed the scope of consent to search for child exploitation-related materials, and at any rate defendant is unable to meet the "plain error" standard.
http://caselaw.lp.findlaw.com/data2/circs/7th/022086p.pdf

United States v. Banks, No. 02-41428 (5th Cir. August 20, 2003). District court erroneously dismissed charges against defendant for possession of a firearm while he was subject to a restraining order. District court's finding that the restraining order to which defendant was subject was not issued after a "hearing" under 18 U.S.C. section 922(g)(8)(A) required reversal as defendant did received a hearing within the meaning of section 922(g)(8)(A).
http://caselaw.lp.findlaw.com/data2/circs/5th/0241428cr0p.pdf

Frison v. Zebro, No. 02-2226 (8th Cir. August 21, 2003). Police officers were entitled to summary judgment on claims that a search and arrest violated plaintiff's Fourth Amendment rights, as they were executing a valid search warrant and arrest was based on probable cause; officers' violation of 18 U.S.C. section 912, impersonating federal census workers, did not give rise to a section 1983 claim.
http://caselaw.lp.findlaw.com/data2/circs/8th/022226p.pdf

Scanlan v. Texas A&M Univ., No. 02-41166 (5th Cir. August 19, 2003). Plaintiffs pleaded sufficient facts in a 42 U.S.C. section 1983 claim to establish deliberate indifference by state university officials, under a state-created danger theory, for injuries in connection with an organized student activity, the 1999 Texas A&M University bonfire disaster.
http://caselaw.lp.findlaw.com/data2/circs/5th/0241166cv0p.pdf



OTC Prilosec may not yield significant Rx savings Although employers and health plans celebrated last December's move of allergy drug Claritin to over-the-counter (OTC) status, they may be disappointed when popular heartburn remedy Prilosec hits store shelves later this year, health experts predict.

When the Food and Drug Administration approved Prilosec maker AstraZeneca's OTC application for Prilosec, plan sponsors hoped this would help curb rampant spending on this drug and others in its class. Heartburn medications like Prilosec compose the second-largest spending category of drugs in the United States behind psychiatrics and carry a price tag of about $140 per prescription.

However, OTC Prilosec's effect on drug benefit costs may be minimized because its Rx successor, Nexium (aka "the little purple pill"), also made by AstraZeneca, boasts faster healing time for severe ulcers and reflux disease. Comparatively, Claritin successor Clarinex is by many reports no more effective than the available OTC version.

Although direct-to-consumer ads have contributed to a 135% increase in Nexium sales, a Medco spokesman says it's "too early to tell" how OTC Prilosec will affect the market.
www.benefitnews.com

2003 MARKS BENEFITS DECREASE

Kelley M. Blassingame *Employee Benefit News* August 2003

The slumping economy and surging health care costs are squeezing many employers, who are trimming back benefits in response. The 2003 Benefits Survey from the Society for Human Resource Management (SHRM), released at the society's annual conference in Orlando in June, finds slight declines in programs ranging from group life and long-term care to prepaid legal and child care assistance.

Despite the cutbacks, "there is an ever-present desire to maintain benefit packages as an important component of recruiting and retaining valued employees," says SHRM VP Debra Cohen. And while declines in most areas are slight, averaging 2% to 3%, the general downward trend is notable, suggesting employers have found their benefits desires don't match their financial wherewithal.

For example, although the percentage of employers offering workers flexible schedules rose last year to 64% from 59% in 2001, flextime dropped this year to 55%. Adoption assistance suffered a similar fate, showing a 5% increase in 2002 to 21% but falling a further 5% in 2003. Child care benefits, generally posting small gains among employers, fell further into single digits this year. Sponsorship of programs such as group life, vision and long-term care

fell 1% to 2%.

The decrease in many work-life offerings might suggest increases in other areas to compensate. However, SHRM finds, core benefits are declining as well. The percentage of employers offering life insurance fell 1% in 2003, and vision coverage declined 2%. Long-term care coverage saw a 1% decrease this year.

However, on the positive side, the findings do suggest employers are increasing their commitment to improving employees' overall wellness, as many wellness benefits were among those that increased in 2003. Employee assistance programs rose 1%, smoking cessation programs and fitness center reimbursements each rose 3%, and weight loss programs increased 2%.
www.benefitnews.com

Today's Word:
Canard (Noun)

Pronunciation: [kê-'nah(r)d]

Definition 1: A grossly exaggerated falsehood, a wildly misleading representation of facts.

Today's Word:
Schlimazel (Noun)

Pronunciation: [shlê-'mah-zêl]

Definition 1: A person with no luck at all, a sort of loser who magnetically attracts misfortune.